

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANIS TAWON HILL,

Defendant-Appellant.

UNPUBLISHED

September 27, 2005

No. 256984

Jackson Circuit Court

LC No. 04-000204-FH

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant was convicted of using a computer to commit a crime, MCL 752.796 (Count I), conspiracy to commit uttering and publishing, MCL 750.249 (Count II), uttering and publishing, MCL 750.249 (Count III), forgery, MCL 750.248 (Count IV), and obtaining personal identity information without authorization, MCL 750.285 (Count V). Defendant was sentenced to 12 to 20 years' imprisonment for Count I, 15 to 28 years' imprisonment for Counts II, III, and IV, and 5 to 10 years' imprisonment for Count V, to run concurrently with each other, but consecutively to his uttering and publishing conviction in case number 03-000258-FH, for which defendant was sentenced on May 20, 2004 to 28 to 252 months' imprisonment. Defendant's sentencing guidelines range was 34 to 100 months. Defendant appeals as of right. We affirm.

At trial, witnesses testified that defendant offered them money for the use of their ATM card, and would deposit forged, computer-generated checks into their bank accounts and later withdraw the funds. Another witness testified that defendant paid him to cash checks that were made out to the witness and give defendant the money. The evidence at trial established that defendant obtained identification and bank account information from several victims by taking the outgoing mail from their mailboxes and generated checks containing these victims' personal and bank account information using a computer.

Defendant argues that the trial court's upward departure from the sentencing guidelines was made without substantial and compelling reasons that are objective and verifiable. We disagree. A sentencing court may depart from the appropriate sentence range established under the sentencing guidelines if the court has a substantial and compelling reason for the departure and states the reason on the record. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003). Reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *Babcock, supra* at 257. A factor meriting departure from the sentencing guidelines

must be objective and verifiable. *Id.* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

The trial court based its upward departure from the sentencing guidelines on the following reasons:

1. Guidelines do not adequately reflect that this is defendant's 4th felony conviction for uttering and publishing of forged checks.
2. Guidelines do not consider that defendant is not only not rehabilitated by his prior convictions and sentences for U & P, but based on the evidence is becoming more sophisticated in his ability to produce checks to pass into commerce as a felony.
3. Guidelines do not adequately consider the amount of grief and problems the victims of the identity theft and false, but with accurate information, checks that were produced and passed by the defendant resulting in funds being taken out of victims['] checking account[s] and real checks written by the victim being refused payment because of inadequate funds in their account.
4. Guidelines do not adequately reflect the suffering of the victims as a result of defendant's actions.

Defendant argues that the trial court's reasons for departure based upon the fact that this is defendant's fourth felony conviction for uttering and publishing were erroneous because the prior convictions were considered by the guidelines in prior record variable (PRV) 2 and PRV 7, he was charged as an habitual offender, and a series of low level crimes such as these does not sufficiently "keenly or irresistibly grab the court's attention" to justify the upward departure. Defendant was scored at twenty points for PRV 2, MCL 777.52, for his three prior low-severity convictions and at twenty points for PRV 7, MCL 777.57, for two or more subsequent or concurrent felony convictions; however, PRV 7 addresses any subsequent or concurrent offenses and is inapplicable to the present issue. We recognize that defendant's three prior uttering and publishing convictions are contemplated by PRV 2. However, the trial court's departure is based not merely on the number of prior convictions, but on the fact that they were for the same kind of crime thus evidencing a lack of rehabilitation. The court was also recognizing the increasing sophistication of defendant's crimes, a fact well-supported by witness testimony. Further, the fact that defendant repeatedly commits the same kind of crime while improving his technique is objective evidence of his lack of rehabilitation. The trial court's departure on this basis was for a substantial and compelling reason.

Defendant also argues that the trial court's reasoning for its upward departure based upon the victims' grief and suffering does not support its upward departure because grief is incorporated into the sentencing guidelines. Defendant's arguments that this reason is contemplated in his score of zero points for OV 4 and OV 10 is without merit because the type and extent of grief, suffering, and vulnerability experienced by the victims in the present case is not contemplated within the scope of these offense variables. Further, defendant's argument that the grief component of the trial court's reasoning for its departure is not objective and verifiable

is equally without merit. Attached to defendant's PSIR are several victim impact statements that detailed the grief and problems suffered by the victims. Victims reported feeling upset, violated, vulnerable, unnerved, anxious, unable to trust anyone, scared to use their own mailboxes, a loss of security in their own home, fearful of the possibility that their personal identification information could be used in the future, and worried about their credit standing. Several victims detailed the steps they had to take to protect their accounts and explain the situation to the creditors that never received their payments. One stated, "[t]his, however, pales in comparison to the stress and anxiety we have felt." Clearly, defendant's many victims suffered emotionally and encountered many problems as a result of his actions. The trial court's reasons for its upward departure on this basis are objective and verifiable and constitute a substantial and compelling reason supporting the departure from the sentencing guidelines.

Defendant also argues that defendant's sentences are not proportional to the offense and the offender. A departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and criminal history. *Babcock, supra* at 264. We find that the departure imposed by the trial court is proportionate to this conduct.

Defendant also argues that he is entitled to resentencing pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Claypool*, 470 Mich 715, 731 n 14; 684 NW2d 278 (2004), our Supreme Court held that "the Michigan [statutory guideline sentencing] system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by a jury in violation of the Sixth Amendment." We have rejected the argument that *Claypool* is not binding on this Court. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004)¹.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Talbot
/s/ Stephen L. Borrello

¹ We note that on March 31, 2005, our Supreme Court granted leave to appeal in *Drohan*, limiting its review to whether *Blakely* and *United States v Booker*, 543 US __; 125 S Ct 738; 160 L E. 2d 621 (2005), apply to Michigan's sentencing scheme. See 472 Mich 881 (2005).